Supreme Court, U.S.
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No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TIMOTHY D. NAEGELE,
Petitioner,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal circuit court ignore a significant, fundamental and dispositive state policy which has been codified by statute, and thereby create, in effect, a contrary federal rule, on the grounds that the state policy was not raised in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy D. Naegele respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is not reported, and is reprinted in the appendix hereto at 1a-6a (Appendix A). The decision of the United States District Court for the Central District of California is not reported, and is reprinted at 7a-12a (Appendix B).

JURISDICTION

The Ninth Circuit issued its decision on August 29, 1994. *See* Appendix A at 1a-6a. A timely petition for rehearing was denied on November 10, 1994. Appendix

C at 13a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

California Code of Civil Procedure section 580d provides, in relevant part:

> No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein—hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.

STATEMENT

This case presents the critical issue of whether a federal circuit court may, by ignoring a dispositive statute reflecting a strong, fundamental public policy, refuse to apply state law simply because that law was raised for the first time on appeal.

In 1984, Timothy D. Naegele ("Naegele") began negotiating a construction loan from Winchester Savings Bank ("Winchester") to build a two-unit condominium building on property Naegele owned in Malibu, California. Appendix A at 2a. In order to make the loan, Winchester required a deed of trust as security and title insurance to insure its priority over other encumbrances, including mechanic's liens. *Id.* at 2a-3a.

Respondent First American Title Insurance Company ("FATIC") provided the required title insurance policy pursuant to which it agreed to defend on behalf of Winchester any mechanic's lien foreclosure actions. *Id.* at 3a. Before issuing the policy, FATIC required Naegele to enter into an agreement obligating Naegele to indemnify FATIC for losses suffered as a result of any mechanic's liens asserted against Naegele's property. *Id.*

Approximately two years after entering into the loan agreement with Winchester, Naegele defaulted. Additionally, several contractors filed mechanic's lien foreclosure actions against Naegele, each asserting lien priority over Winchester's deed of trust. *Id.* Winchester settled with the mechanic's lien claimants and obtained reimbursement of 50 percent of the settlement amount from FATIC. Winchester sold the property through nonjudicial foreclosure to satisfy Naegele's debt. Pursuant to the indemnification agreement, FATIC requested reimbursement from Naegele for the sums FATIC had paid the mechanic's lien claimants. Naegele denied this request. *Id.*

On March 21, 1989, FATIC instituted this action against Naegele for breach of the indemnification agreement. Upon cross-motions for summary judgment, the district court granted judgment in FATIC's favor. Appendix B at 7a-12a. On appeal to the Ninth Circuit, Naegele argued for the first time that California's antideficiency statute (Cal. Civ. Proc. Code § 580d)—which protects a debtor from personal liability following the nonjudicial sale of the security—barred FATIC's attempt to impose personal liability on him. Appendix A at 5a. In affirming the district court's grant of summary judgment in favor of FATIC, the Ninth Circuit refused to consider California's antideficiency statute because Naegele had raised the statute for the first time on appeal. *Id.*

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's refusal to consider California Code of Civil Procedure section 580d warrants review by this Court. A federal court is not free to ignore a fundamental state policy simply because that policy was not raised in the trial court. The Ninth Circuit's refusal to apply California law squarely conflicts with the Second Circuit's decision in *Green v. Brown,* 398 F.2d 1006 (2d Cir. 1968), and the Third Circuit's decision in *O'Neill v. United States,* 411 F.2d 139 (3d Cir. 1969). In *Green*

and *O'Neill,* the Second and Third Circuits, respectively, considered statutes raised for the first time on appeal because the application of those statutes furthered strong, fundamental public policies. In contrast, the Ninth Circuit refused to consider the dispositive California antideficiency statute even though that statute embodies a fundamental public policy of the state of California. The issue of whether a federal circuit court may ignore a state statute evidencing a strong and fundamental public policy, simply because it was not raised in the district court, is one of continuing reoccurrence and importance. The lack of guidance and uniformity on this issue should not be left unresolved.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH WELL-SETTLED HOLDINGS OF THE SECOND AND THIRD CIRCUITS

The Ninth Circuit's decision squarely conflicts with the Second Circuit's decision in *Green* and the Third Circuit's decision in *O'Neill. See Green v. Brown,* 398 F.2d 1006 (2d Cir. 1968); *O'Neill v. United States,* 411 F.2d 139 (3d Cir. 1969).[1] In *Green,* a shareholder of an investment company brought a derivative suit against one former and ten present directors of the company. *Green,* 398 F.2d at 1007. Plaintiff alleged that defendants had violated the Investment Company Act of 1940 by causing the corporation, without prior shareholder approval, to make two loans that were prohibited by the investment policy recited in the corporation's registration statement on file with the Securities and Exchange Commission. *Id.* In the district court, the plaintiff relied on a provision of the Investment Company Act that made it a violation of the Act to deviate from "fundamental" policies set forth in the company's registration statement without prior share-

[1] *See also Dean Witter Reynolds, Inc. v. Fernandez,* 741 F.2d 355, 361 (11th Cir. 1984) (considering Cuban Asset Control Regulations for first time on appeal because they present "significant questions of . . . great public concern").

holder approval. *Id.* at 1008. After considering this provision, the district court granted summary judgment in favor of the defendants because the investment policy at issue had not been labeled as "fundamental" in the registration statement. *Id.*

On appeal, the plaintiff raised for the first time a provision of the Investment Company Act making it unlawful for a company to lend money if "the investment policies of such registered company, as recited in its registration statement . . . do not permit such a loan * * *." *Id.* at 1008-09. Although noting its reluctance to consider issues not raised in the trial court, the Second Circuit held such a newly raised issue ought to be considered when it embodied an important public policy. *Id.* at 1009. In remanding the case to the district court, the Second Circuit emphasized that "the issues now raised are of great significance in construing an act designed to protect thousands of investors." *Id.* at 1009-10.

The Third Circuit in *O'Neill* similarly considered a state statute raised for the first time on appeal because of the important state policy set forth therein. In *O'Neill,* plaintiff brought suit against the United States for injuries suffered while he was working at a United States Post Office. *O'Neill,* 411 F.2d at 140-43. Plaintiff was permanently injured when, while drilling a hole in the floor, he lost his balance and extended his arm into a conveyor used for sorting mail. *Id.* The district court entered judgment for the United States on the plaintiff's claim, finding no negligence on the part of the United States. *Id.* at 141. On appeal, plaintiff contended that the United States was negligent for failing to provide a guard or shield for the conveyor. *Id.* at 142. In support of this contention, plaintiff relied for the first time on a Pennsylvania safety statute that required certain devices to be "properly guarded to protect workers from injury" and to be "designated, constructed, equipped, and operated as to eliminate dangerous conditions." *Id.* at 143.

The Third Circuit remanded to the district court for its consideration of the statute, opining that "[t]he safety statute is an expression of Pennsylvania's rule of social policy" and noting that the case involved "the interest of an injured workman and the policy of the State. . . ." *Id.* at 144.

Like the appellants in *Green* and *O'Neill,* Naegele argued for the first time on appeal to the Ninth Circuit that California's antideficiency statute barred FATIC's claim for breach of the indemnity agreement. The California antideficiency statute, which provides that a debtor cannot be required to pay a deficiency after a nonjudicial foreclosure, espouses one of the most fundamental public policies of the state of California. Cal. Civ. Proc. Code § 580d; *see Commonwealth Mortgage Assurance Co. v. Superior Court,* 211 Cal. App. 3d 508, 259 Cal. Rptr. 425 (1989). In California, a creditor faced with a defaulting debtor may elect either to foreclose *judicially* on any security for the debt, in which case the debtor has the right of redemption, or *nonjudicially,* in which case the debt may only be satisfied from the proceeds of the sale. Cal. Civ. Proc. Code § 580d; *Commonwealth Mortgage,* 259 Cal. Rptr. at 428. If the creditor chooses nonjudicial foreclosure, the debtor loses his right to redeem the property and therefore loses a substantial and valuable asset. *Commonwealth Mortgage,* 259 Cal. Rptr. at 428. The California legislature has determined, through antideficiency legislation, that such debtors should not be exposed to direct or indirect personal liability in such a situation. *Id.* at 429.

So strong is the California public policy regarding antideficiency that *all* persons, not just lenders, are prevented from seeking deficiencies from the debtor. *Id.* at 426 30. Indeed, California courts have specifically held that indemnity agreements like that present here violate the antideficiency legislation. *Id.* at 430. In *Commonwealth Mortgage,* for example, a mortgage guarantee insurer sued

a debtor for breach of an indemnity agreement. In holding that the indemnity agreement was simply an attempt to circumvent the antideficiency legislation, the Court reasoned:

> [T]he "Legislature clearly intended to protect the debtor from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the debtor following a nonjudicial sale of the security. To permit a guarantor [or insurer] to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d."
>
> * * * *
>
> . . . [W]e conclude the [indemnity] agreements are simply attempts to have the [debtors] waive in advance the protection against a deficiency judgment afforded by section 580d, which waiver is against public policy and void. . . . To splinter the transaction and view the indemnity agreements as separate and independent obligations . . . is to thwart the purpose of section 580d by a subterfuge, . . . a result we cannot permit.

Id. at 429-30 (citations omitted).

Like the indemnity agreement in *Commonwealth Mortgage,* the indemnity agreement in this case is simply an attempt to circumvent California's antideficiency legislation. Here, Winchester foreclosed nonjudicially on Naegele's security. Winchester's foreclosure proceeds were reduced, and a deficiency created, when it agreed to pay mechanic's lien claimants. Winchester recovered a portion of this deficiency from FATIC, which in turn sought reimbursement from the debtor, Naegele. FATIC's attempt to collect this deficiency from Naegele is barred by the California antideficiency legislation.

The Ninth Circuit's refusal to consider the California antideficiency statute and the fundamental public policy set forth therein conflicts squarely with the decisions of the

Second and Third Circuits in *Green* and *O'Neill.* The practical import of this conflict is evident. In the Second and Third Circuits, parties may raise dispositive statutes for the first time on appeal if the application of those statutes furthers an important public policy. In the Ninth Circuit, however, fundamental state law may be ignored simply because it was not raised in the district court.

II. BY IGNORING A SIGNIFICANT STATE POLICY, THE NINTH CIRCUIT IS, IN EFFECT, CREATING CONTRARY FEDERAL COMMON LAW

This Court has recently cautioned against the runaway creation of federal common law. *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 114 S. Ct. 2048, 2053 (1994) ("There is no federal general common law.") (citation omitted). The effect of ignoring a fundamental state policy on the grounds that the litigants themselves did not raise it early enough is to create, in all such instances, a contrary federal policy. There are obviously instances where issues, not raised, must be considered waived. But this ought not to be the case where fundamental state policies are at stake—policies which a state appellate court would invoke for the first time on appeal. *See, e.g., Wong v. Di Grazia,* 60 Cal. 2d 525, 532 n.9 (1963) (holding that it was proper for appellate court to consider rule against perpetuities for first time on appeal because the "issue as to the rule against perpetuities is of considerable public interest."). Rather than always refusing to apply state policies simply because they were not previously raised, federal appellate courts ought to be required to assess the fundamental importance to the state of the policy being invoked. It is this analysis which the Third Circuit did in *O'Neill,* but which the Ninth Circuit refused to do here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPROVED

APPENDIX A

[Filed Aug. 29, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55590

D.C. No. CV-89-01653-LGB

FIRST AMERICAN TITLE INSURANCE COMPANY,
Plaintiff-Appellee,
v.
TIMOTHY D. NAEGELE,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Submitted August 23, 1994 **

MEMORANDUM *

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Timothy D. Naegele appeals pro se the district court's summary judgment for defendant First American Title Insurance Company ("FATIC") in FATIC's diversity action seeking damages for breach of an indemnity agreement. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

We review de novo the district court's summary judgment. *See First Am. Title Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 971 F.2d 215, 217 (9th Cir. 1992) (as amended). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

Naegele contends the district court erred by granting summary judgment for FATIC because FATIC failed to establish the elements necessary for an action to recover for breach of an indemnity agreement. This contention lacks merit.

In California:

> [A]n indemnitee seeking to recover on an agreement for indemnification must allege the parties' contractual relationship, the indemnitee's performance of that portion of the contract which gives rise to the indemnification claim, the facts showing a loss within the meaning of the parties' indemnification agreement, and the amount of damages sustained.

Four Star Elec., Inc. v. F & H Constr., 10 Cal. Rptr. 2d 1, 2 (Cal. Ct. App. 1992). Here, the record shows the following undisputed facts.

In 1984, Naegele began negotiating a construction loan from Winchester Savings Bank ("Winchester") to build a two-unit condominium on property Naegele owned in Malibu, California. The loan was to be secured by a deed of trust on the property and, as a condition of the loan, Winchester required Naegele to provide title insurance to

insure the priority of Winchester's deed of trust over other encumbrances, including any mechanic's liens.

FATIC was requested to issue the title insurance policy. The policy required FATIC to defend on behalf of Winchester any mechanic's lien foreclosure actions. Thus, before issuing the policy, FATIC required Naegele to enter into an indemnification agreement. This agreement, dated October 26, 1984, required Naegele to indemnify FATIC for any losses FATIC suffered as a result of any mechanic's liens asserted against Naegele's property.

At about the same time, Winchester and Naegele opened an escrow with First American Tile Company of Los Angeles ("FATCOLA"), a company underwritten by FATIC. Winchester and Naegele both submitted escrow instructions to the escrow officer pursuant to which FATCOLA, upon the completion of certain duties, was to issue the title insurance policy. Both parties specified that the policy was to insure Winchester's deed of trust as a first lien on the title to Naegele's property. On November 15, 1984, the escrow closed and FATCOLA issued the insurance policy.

In 1987, several contractors filed mechanic's lien foreclosure actions against Naegele, each asserting that their lien had priority over Winchester's deed of trust. FATIC defended the actions as required under the insurance policy and paid substantial amounts of money to settle at least two of the actions. FATIC then requested Naegele to reimburse FATIC pursuant to their indemnification agreement. Naegele refused to pay.

We agree with the district court that the undisputed facts establish the necessary elements for FATIC's claim for breach of the indemnification agreement. *See Four Star Elec.*, 10 Cal. Rptr. 2d at 2. Furthermore, the undisputed facts show that Naegele breached the indemnification agreement. Because FATIC thus was entitled to judgment as a matter of law, the district court did not err

by granting summary judgment for FATIC. *See* Fed. R. Civ. P. 56(c).

In support of his contention that FATIC failed to establish the elements of its cause of action, Naegele argues that the indemnification agreement never was formed because FATIC failed to furnish the required consideration. He argues that (1) the indemnity agreement contemplated that the title insurance policy would issue as requested by Naegele, (2) he requested in his escrow instructions that the insurance policy was to insure that Winchester's deed of trust was first in priority, (3) the policy was issued despite evidence that construction had begun on his property, and (4) FATIC should have known that any mechanic's liens arising from that construction would have priority over Winchester's deed of trust. Naegele argues that because FATIC failed to insure that Winchester's deed of trust was first in priority, FATIC failed to issue the title insurance policy as requested by Naegele. Naegele concludes that FATIC therefore failed to furnish the consideration necessary to form the indemnification agreement.

The first problem with Naegele's argument is that the escrow holder in this case was FATCOLA, and not FATIC. Although FATCOLA is underwritten by FATIC, they are separate entities. Moreover, we reject Naegele's claim that the equities require that FATIC and FATCOLA be treated as one entity. *See Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co.*, 286 Cal. Rptr. 435, 441 (Cal. Ct. App. 1991) (stating that express language of indemnity agreement, not equities, control). Therefore, as FATIC was not the entity to whom Naegele's escrow instructions were directed, FATIC cannot be held responsible for any alleged failure to follow those instructions.

The more important problem with Naegele's argument is that he ignores the very purpose of title insurance. Naegele suggests in his argument that the title insurance

policy was to guarantee the first priority position of Winchester's deed of trust. "[A] title insurance policy, [however,] is a contract of indemnity, not one of guarantee. The insurer does not represent that title is in any particular condition, but only agrees to indemnify to the extent the insured suffers a loss caused by defects in the title or encumbrances on the title." *Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal. Rptr. 2d 912, 915 (Cal. Ct. App. 1993); *see generally* 4 Bernard E. Witkin, *Summary of California Law*, § 214 (9th ed. 1987); Cal. Ins. Code §§ 12340.1-.2, .10. Indeed, the policy issued by FATIC is generally considered as covering the type of loss that occurred in this case. *See generally* 3 Harry D. Miller & Marvin B. Starr, *California Real Estate*, §§ 7.42, .57 (2d ed. 1989) (discussing losses covered by American Land Title Association Loan Policy).

Naegele also argues that he was not required to perform under the indemnification agreement because the losses suffered by FATIC were caused by FATIC's breach of its fiduciary duties and FATIC's own negligence. This argument, however, is based entirely on the purported conduct of FATCOLA, not FATIC. As we stated above, FATIC cannot be held responsible for the alleged conduct of FATCOLA.

On appeal, Naegele filed a motion asking this court to take judicial notice of California's anti-deficiency statutes and the relevant case law. Naegele's motion, however, is more than a simple request for judicial notice because he raises an entirely new legal theory for the first time on appeal. The general rule is that we do not consider issues raised for the first time on appeal. *See United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). Although there are exceptions to this rule, we conclude that they are not applicable in this case. *See id.* Therefore, Naegele's motion is denied.

Both parties request costs on appeal. FATIC's request is granted; Naegele's request is denied. *See* Fed. R. App.

P. 39(a). In addition, FATIC's request for attorneys' fees on appeal is denied on the ground FATIC failed to identify the authority under which it seeks attorneys' fees. *See United States v. City & County of San Francisco*, 990 F.2d 1160, 1161 (9th Cir. 1993); 9th Cir. R. 28-2.3, 39-1.6.

AFFIRMED.

APPENDIX B

[Filed Mar. 15, 1993]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 89-1653 LGB

FIRST AMERICAN TITLE INS. CO.,
Plaintiff,

v.

TIMOTHY D. NAEGELE,
Defendant.

ORDER & JUDGMENT

The following motions are pending before the Court:

a) Plaintiff's motion for summary judgment;

b) Defendant's motion for summary judgment;

c) Defendant's motion for reconsideration of magistrate's order; and,

d) Plaintiff's request for judicial notice.

After reviewing the materials submitted by the parties and arguments of counsel, the Court hereby issues the following ORDER:

I. CROSS MOTIONS FOR SUMMARY JUDGMENT

Because the parties have filed cross motions for summary judgment with respect to the same precise issues, this Order will discuss these motions together.

A. LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary

judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Whether a fact is material is determined by looking to the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law . . . ." *Id.*

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Id.* at 256.

A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970)).

The Supreme Court has held that a party moving for summary judgment may meet its initial burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). After the moving party points out this absence of evidence, the burden shifts to the nonmoving party to show that there is a triable issue of fact. *Id.* at 317.

B. FINDINGS OF FACT

The parties entered into an indemnification agreement, on October 26, 1984. *See* Plaintiff's Ex. 2.

This agreement was entered into by the parties so that Plaintiff would in turn issue a policy of title insurance to Winchester Savings, the institution to which Defendant had applied for loans for his construction project.

The language of this agreement clearly obligated Defendant to indemnify Plaintiff and hold it harmless against, among other things, mechanic's liens recorded against the construction project and actions filed to foreclose mechanic's liens for which Plaintiff had or may have had responsibility to the insured lender. Defendant's obligations were clearly and comprehensibly set forth in the agreement.

Plaintiff issued a title insurance policy for the benefit of Winchester Savings, and otherwise performed in accordance with the agreement. *See* Plaintiff's Exhibit 5.

Pursuant to its ruling *infra,* the Court takes judicial notice of the mechanic's liens and foreclosure actions which were recorded and filed against the project and the parties. Defendant did not defend against the mechanics' liens and foreclosure claims filed and recorded against the property, despite Plaintiff's written demands. Nor did Defendant in other respects perform in accordance with his obligations under the indemnification agreement. *See, e.g.* Collins Dec. ¶¶ 10, 14; McKay Dec. ¶¶ 9, 11; Walter De., ¶¶ 8, 9; Plaintiff's Ex. 13, 15, 16, 20.

Based on the settlements paid in the *R.R. Walter Company, Inc.* and *Carmel Architectural Sales* actions, and the attorneys' fees and costs properly paid to date by Plaintiff to Winchester Savings, Defendant is presently indebted to Plaintiff in the sum of $164,417.54, plus interest on each of the disbursements made by Plaintiff from the date of each disbursement. In addition, Defendant will also be indebted to Plaintiff for additional attorneys' fees or costs, if any, that it may be required to pay to Winchester Savings.

In February, 1989, Defendant wrote to Plaintiff and acknowledged that he knew of no defenses to claims that he was liable under the indemnity agreement. *See* Plaintiff's Exs. 20, 21.

Plaintiff indeed conducted an inspection of the relevant property on November 8, 1984, prior to issuance of the

title insurance policy on November 15, 1984. *See* Plaintiff's Zakoo Dec., ¶ 7; Plaintiff's Ex. 4. There is no evidence in the record that Plaintiff acted negligently in its issuance of the title insurance policy to Winchester Savings, or in any other acts or omissions.

There is no evidence in the record that the settlements agreed to by Plaintiff, Winchester Savings, and the individuals and entities who filed and recorded mechanics' liens and claims against the property were unfair, inappropriate, or entered into in bad faith.

C. CONCLUSIONS OF LAW

In *Four Star Elec., Inc. v. F & H Const.*, 7 Cal. App. 4th 1375, 1380 (1992), the court listed the elements of recovery on an indemnity agreement as follows:

> An indemnitee seeking to recover on an agreement for indemnification must allege the parties' contractual relationship, the indemnitee's performance of that portion of the contract which gives rise to the indemnification claim, the facts showing a loss within the meaning of the parties' indemnification agreement, and the amount of damages sustained.

The uncontroverted evidence demonstrates that each of these elements has been established in the instant matter.

The uncontroverted evidence establishes that Defendant is in breach of his obligations under the agreement.

The uncontroverted evidence establishes that Defendant has no valid defenses to liability under this agreement.[1]

The Court concludes that Defendant is therefore obligated to Plaintiff under the indemnification agreement.

---

[1] In *Smoketree-Lake Murray, Ltd. v. Mills Concrete Const. Co.*, 234 Cal. App. 3d 1724, 1737 (1991), the court held that the express language of an indemnity contract, rather than the equities of a given situation, shall control. A similar statement may be found in the indemnification agreement itself. *See* Plaintiff's Ex. 2.

Therefore, Defendant's motion for summary judgment is DENIED, and Plaintiff's motion for summary judgment is GRANTED.

II. DEFENDANT'S MOTION FOR RECONSIDERATION OF MAGISTRATE'S ORDER

Federal Rule 72(a) governs district court review of Magistrate orders, and provides that the district court may reverse nondispositive orders of the Magistrate if those orders are "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). Similar language may also be found in 28 U.S.C. § 636.

First, Defendant has cited no facts which show that the Magistrate's decision was clearly erroneous.

Second, the only legal authority which Defendant has cited, *Rockwell Int'l, Inc. v. Pos-A-Traction, Inds., Inc.*, 712 F.2d 1324 (9th Cir. 1983), concerned a situation which is not analogous to the instant situation.

Third, as Defendant himself acknowledges in his brief, his motion was filed in an untimely manner and thus did not give Plaintiff an adequate opportunity to respond.

For all of these reasons, Defendant's motion for reconsideration is DENIED.

III. PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE

Plaintiff's request for judicial notice is GRANTED.

JUDGMENT

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

Judgment be and hereby is entered in favor of Plaintiff and against Defendant in the amount of $164,417.54, plus prejudgment interest from the time of each disburse-

ment at the statutory rate of ten percent (10%) per annum.

IT IS SO ORDERED.

Dated: March 15, 1993

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55590

D.C. No. CV-89-01653-LGB
Central California
(Los Angeles)

FIRST AMERICAN TITLE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

TIMOTHY D. NAEGELE,
Defendant-Appellant.

ORDER

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges.

The petition for rehearing is denied.